IN THE

Supreme Court of the United States

OCTOBER TERM, 1915

SEABOARD AIR LINE RAILWAY,
Appellant,
v.
THE CITY OF RALEIGH
and James I. Johnson, O. G. King, and R. B. Seawell,
Commissioners of the City of Raleigh.

No. [redacted]59

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

BRIEF FOR PLAINTIFF-APPELLANT.

MURRAY ALLEN,
Counsel for Plaintiff.

COMMERCIAL PRINTING COMPANY, RALEIGH, N. C.

SUBJECT INDEX

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STATEMENT OF THE CASE

This is a bill in equity filed by the plaintiff in the United States District Court for the Eastern District of North Carolina to secure an injunction restraining the City of Raleigh and the individual defendants, Commissioners, from enforcing an ordinance requiring plaintiff to remove its tracks from the sidewalk on the East side of Salisbury Street in the city of Raleigh, between Jones Street and Lane Street. Plain-

tiff alleged that by a prior statute and ordinance a contractual right to occupy said sidewalk had been created, the obligation of which is impaired by the ordinance, the enforcement of which it is desired to enjoin.

The cause was submitted upon the bill and answer and statement of facts agreed. (Printed record, pages 1, 12, and 15.) The District Court rendered judgment refusing the injunction and dismissing the bill and plaintiff appealed.

In the opinion of District Judge Connor, (Printed record, page 18,) the facts are set out as follows:

Plaintiff is a Virginia corporation and successor to the property, rights and franchises of the Raleigh & Gaston Railroad Company, chartered by the General Assembly of North Carolina, at its session of 1835. The city of Raleigh was the Southern terminus of said railroad. Pursuant to the provisions of the charter, the said company constructed a track from Gaston N. C., to Raleigh, N. C., and constructed terminals and depots, in said city, for the receipt and delivery of freight and passengers, including a freight depot and a warehouse on Halifax Street between Lane and North Streets, extending from Halifax Street to Salisbury Street, extending its tracks from the main line of the Raleigh & Gaston Railroad across Salisbury Street into said depot and warehouse. During the year of 1881, a cotton compress was constructed on a lot in the city of Raleigh, bounded by Salisbury, Jones Halifax and Lane Streets and, for the purpose of delivering to, and receiving cotton from said warehouse, and to serve the patrons of the said railroad company, and to furnish the public facilities for the delivery of cotton. (Note: This should be "freight." See Bill of Complaint, Section 6, record, page 2), in car load lots, and to better perform its functions as a common carrier, the Raleigh & Gaston Railroad company made application to the Board of Aldermen of Raleigh for the grant of the right, privilege or franchise, to occupy the sidewalk on the east side of Salisbury Street between Jones and Lane Streets for the pur-

pose of constructing a track thereon. Said Board of Aldermen on August 5, 1911, adopted the following resolution, or ordinance:

> "Upon application of John C. Winder, General Superintendent, the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of running a track."

When the track was constructed, pursuant to the permission granted by said ordinance, it was used as a public track in connection with the cotton compress in the cotton season, and was used for the purpose of loading and unloading freight for the public, without additional compensation to the railroad for its use, and for any other purpose for which the railroad company desired to use it. Since the year 1906, the cotton compress has not been used. Since that date the said track has been used exclusively for loading and unloading freight and storing empty cars engaged in intra and interstate traffic. It has been, and is now, used by the merchants of the city of Raleigh and by the public and on account of its location, is convenient for the said purpose. The right to maintain said track, as it is now placed and used on Salisbury Street, is of value to plaintiff exceeding $3,000 exclusive of cost herein.

The track has been maintained and operated by the Raleigh & Gaston Railroad Company and the plaintiff, its successor, since 1881, with the knowledge and permission of the officers and representatives of the City of Raleigh. The plaintiff is the sole owner and occupant of the block of land, in said city, bounded on the west by Salisbury Street, on the north by Lane Street, on the east by Halifax Street and on the south by Jones Street, and is the sole owner and occupant of the block in said city next adjacent to said block and to the north thereof, bounded on the west by Salisbury Street, on the north by North Street, on the east by Halifax Street

and on the south by Lane Street. The two blocks are used by the plaintiff for the purpose of conducting its business exclusively. Salisbury Street is forty-three feet wide between curbs at that point at which the track is located on the sidewalk, and in addition thereto, there is located a sidewalk on the west side of the street 13 feet wide, the portion of the sidewalk on the east side of the street occupied by the plaintiff's track, is 10 feet wide; the street and the sidewalk on the west side thereof, are available to, and are used by, the public. In constructing a new freight station two years ago, it was necessary for the Seaboard Air Line Ry. Company to make an excavation at the corner of Jones and Salisbury Streets of about eight feet, extending northwards along Salisbury Street, the tracks constructed in connection with said freight station are in this excavation and the freight station is between these tracks and Halifax Street. They cannot be used as team tracks, and the other team tracks of plaintiff, are on Lane Street, which is one block north of Jones Street, a distance of 420 feet; the said track on Salisbury Street extends from Jones Street to Lane Street. The Southern end of the track on Salisbury Street is one block north of the State Capitol, a distance of 420 feet. With the track as it is now laid and used, there is no sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for use by pedestrians. Within the two years last past plaintiff has built on the site upon which the compress stood, and immediately to the east of said side track, a commodious freight warehouse, with an approach to the same by wagons from the east on the side of the building opposite said side track with two tracks between said depot, and the east line of the sidewalk in question and, in addition thereto, has constructed several team tracks to the north of said warehouse.

At their meeting, on June 10, 1913, the defendants, Commissioners of the City of Raleigh, after hearing the matter, and against the protest of plaintiff, adopted a resolution ordering the removal of the track constructed and maintained

by plaintiff on the sidewalk, on the east side of Salisbury Street, between Jones and Lane Streets, being the track described in the resolution, or ordinance of August 5, 1881. By said resolution, the Commissioner of Public Works of the city of Raleigh was directed, if plaintiff failed to do so, to remove the said track. Certain Private Laws are set out, or referred to, in the Bill and are to be considered as evidence. A preliminary injunction was issued and the cause heard upon the prayer for a permanent injunction restraining defendants from removing said track, or otherwise enforcing said resolution or ordinance of June 10, 1913. It is conceded that the plaintiff is entitled, by succession, to such rights, privileges and franchises as vested in the Raleigh & Gaston Railroad Company by virtue of its charter, and amendments thereto, and the ordinance of August 5, 1881, or which it may, upon the facts herein set out, have acquired.

SPECIFICATIONS OF ERROR.

The complainant specifies and relies upon the following errors in the judgment and opinion of the District Court:

1. Because the United States District Court for the Eastern District of North Carolina erred in dismissing the bill of complaint and denying the complainant the injunctive relief prayed for, for that the enforcement of the ordinance of the City of Raleigh, ordering the removal of the track of the complainant from the street and sidewalk on the east side of north Salisbury Street in the City of Raleigh between Jones and Lane Streets, will impair the obligation of a valid and binding contract between the City of Raleigh and the complainant in violation of Section 10, Article 1, of the Constitution of the United States, which section and article were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

2. Because the said Court erred in dismissing the bill of complaint and denying the complainant the injunctive relief prayed for, for that the enforcement of the said ordinance will operate as an interference with interstate commerce in violation of the provisions of the Constitution of the United States, Section 8, Article I, conferring upon Congress the power to regulate interstate commerce, and in violation of the acts of Congress passed pursuant to the power so granted, which section and article were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

3. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for that by virtue of its charter and the general laws of the State of North Carolina, the Raleigh & Gaston Railroad Company, predecessor of complainant, had the power, with the assent of the municipal authorities of the city of Raleigh, to occupy the sidewalk on the east side of North Salisbury Street between Jones and Lane Streets in the city of Raleigh, for the purpose of running a track thereon, the said power being specifically granted by the acts of the General Assembly of North Carolina, Session of 1871-2, Chapter 38, Section 29, Sub-section 6, as brought forward and amended by the Code, Sections 1957 and 1982, and Revisal of 1905, Sections 2566 and 2567, as follows:

"Every railroad corporation shall have power: (6) to construct their road across, along or upon any stream of water, water course, street, highway, plankroad, turnpike, or canal, which the route of its road shall intersect or touch, but the company shall restore the stream or water course, street, highway, plankroad and turnpike road thus intersected or touched to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this act contained shall be con-

strued to authorize the erection of any bridge or other obstruction across, in or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstruction may be proposed to be placed nor to authorize the construction of any railroad not already located in, upon or across any street in any city without the assent of the corporation of such city."

That the said track was constructed and has remained in said street and has been maintained pursuant to the powers conferred by the said act of the General Assembly of North Carolina, with the assent of the city of Raleigh, and the enforcement of the ordinance enacted by the Commissioners of the city of Raleigh ordering the removal of said track will impair the obligation of the contract thereby created in violation of Section 10, Article 1, of the Constitution of the United States, the provisions of which article and section were expressly set up and relied upon by complainant in protection of its rights and against the enforcement of said ordinance.

4. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for that the lapse of time, more than thirty-one years during which the said track has been continuously maintained and operated along the said sidewalk has created in the Raleigh & Gaston Railroad Company and its successor and assign, Seaboard Air Line Railway, complainant in this suit, the right to retain said track, which right constitutes a contract subject to the protection of Section 10, Article 1, of the Constitution of the United States, and the enforcement of said ordinance ordering the removal of said track will result in impairing the obligations of said contract in violation of the said provisions of the Constitution of the United States, the protection and benefit of which article and section of the Constitution the complainant expressly set up and relied upon.

5. Because the said Court erred in dismissing the bill of complaint and in denying the complainant the injunctive relief prayed for, for that it appears from the admissions in the pleadings and the facts agreed that said track was placed in Salisbury Street and has remained there under and by virtue of a contract, the obligations of which will be impaired by the enforcement of the ordinance ordering its removal, in violation of Section 10, Article 1, of the Constitution of the United States, which section and article were expressly set up and relied upon by the complainant.

6. Because the Court erred in holding that the complainant's claim is based upon the language of an ordinance, adopted thirty years ago to meet a temporary condition, for that it appears from the admissions in the pleadings and the facts agreed that the track was constructed for a permanent purpose, that when the track was constructed pursuant to the permission granted in the ordinance of the City of Raleigh, adopted August 5, 1881, it was used as a public track in connection with the cotton compress of complainant in the cotton season and was used for the purpose of loading and unloading freight for the public and for any other purposes for which the railroad company desired to use it.

7. Because the Court erred in holding that the ordinance of the City of Raleigh of August 5, 1881, does not vest in complainant the property right in the use of said sidewalk for which it contends, and that, if such construction is permissible, the commissioners were not vested by the Legislature with the power to make such exclusive, perpetual grant of the sidewalk to the Raleigh & Gaston Railroad Company, which prevents the present governing board, in which the power is vested and upon which the duty is imposed, to control and regulate the use of the sidewalks for the benefit of the public from making and enforcing the ordinance of June 10, 1913,

for that the ordinance of August 5, 1881, granted permission to occupy the sidewalk for general railroad purposes in perpetuity and the acceptance of the grant and the expense incurred in the construction of the said track created a valid and binding contract between the City of Raleigh and the Raleigh & Gaston Railroad and its successor, Seaboard Air Line Railway, to maintain its track in the said street in perpetuity, and for that the right to construct and maintain its tracks in the streets of the City of Raleigh was given the Raleigh & Gaston Railroad Company by the act of the Legislature of North Carolina, with the assent of the City of Raleigh, and such assent was given by the ordinance of August 5, 1881, and by acquiescence in the occupancy of the sidewalk by the track for all purposes by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, and for that the acquiescence of the City of Raleigh for more than thirty-one years in the use of said sidewalk by the Raleigh & Gaston Railroad and by its successor, Seaboard Air Line Railway, has created the right to retain said track, which right constitutes a contract and it is not within the power of the governing board of the City of Raleigh to order the removal of the said track, because to do so would impair the obligations of the contract of complainant in violation of the Constitution of the United States, Section 10, Article 1, which was especially set up and relied upon by complainant.

8. Because the said Court erred in holding that the right to occupy the street was not given by the act of the Legislature of North Carolina because said act provided that the street occupied by a track must be restored to its former state, for that the statute provides that the company shall restore the street to its former state or to such state as not unnecessarily to have impaired its usefulness, and the said street has been restored to such

state as not unnecessarily to have impaired its usefulness, and the portion of the street occupied was expressly designated by the ordinance of August 5, 1881, and such portion of the street has been continuously occupied since that time for general railroad purposes with the knowledge of the municipal authorities until the ordinance of June 10, 1913, was adopted. The facts agreed show that Salisbury Street is forty-three feet in width at this point, that there is located on the west side a sidewalk thirteen feet in width, and the portion of the sidewalk on the east side occupied by the complainant's track is ten feet wide, and that the street and the sidewalk on the west side thereof are available to and are used by the public. It further appears that complainant is the sole abutting property owner along the east side of Salisbury Street for the entire length of said track.

9. Because the said Court erred in holding that the City of Raleigh is not estopped to deny that it has given its assent to the occupation of Salisbury Street by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, for that railroad companies have the right to occupy the streets with the assent of the City of Raleigh, and with the knowledge of the proper municipal authorities having proceeded to exercise the right, and having constructed, maintained and operated its track in Salisbury Street for general railroad purposes, the City of Raleigh is estopped from asserting that it has not given its assent to such use of the street.

10. Because the Court erred in holding that the assent of the City of Raleigh to the occupancy of said street will not be presumed after the lapse of so many years, and in holding that under the statutory system of North Carolina, this is but a plea of the statute of limitations, for that, as the complainant contended, the assent of the City of Raleigh would be presumed by rea-

son of the occupancy of the street by the railroad for a long period of years for general railroad purposes under such circumstances as to amount to a claim of the right to so occupy it, and for that the City of Raleigh having power to grant the right to occupy the street, such grant is presumed where the right has been exercised for a period of more than twenty years.

11. Because the said Court erred in holding that the question of whether the usefulness of Salisbury Street is unnecessarily impaired is for determination by the commissioners of the City of Raleigh, and that the wisdom of their action is manifest, for that, it is for the Court to say whether the usefulness of the street is unnecessarily impaired.

12. Because the Court erred in holding that in the absence of express legislative grant, the terms of which are free from doubt and ambiguity, the municipal authorities are not authorized to grant to a public utility corporation a franchise to occupy and appropriate the exclusive use of a street or sidewalk to be enjoyed in perpetuity, and that said power was not granted to the commissioners of the City of Raleigh by the charter existing at the time of the resolution, or ordinance, giving permission to the Raleigh & Gaston Railroad Company to occupy the sidewalk on Salisbury Street was adopted, August 5, 1881.

13. Because the decree of the Court is against the law and equity of the case and against the admissions and facts agreed.

14. Because upon the admissions in the pleadings and the facts agreed, the complainant was entitled to injunctive relief against the enforcement of the ordinance of the City of Raleigh of June 10, 1913, as prayed for in the bill of complaint.

QUESTIONS IN THE CASE.

After conceding that the charter of the city of Raleigh in force at the time of the adoption of the ordinance of August 5, 1881, conferred upon the governing board the power to grant a quasi public corporation the right to a reasonable use of the public streets, not inconsistent with the right of the public, and that when such right of user is granted, within the power of such authorities, and such grant is accepted and acted upon, a property right vests in the grantee of which it may not be deprived otherwise than by due process of law, Judge Connor says:

"Notwithstanding these concessions, two questions remain open for decision. Did the ordinance of 1881 construed in the light then existing conditions, and the reasons inducing its passage, grant to plaintiff's predecessor in title a right to be enjoyed in perpetuity to appropriate to its use, by locating and maintaining a track thereon, to the exclusion of all others, the sidewalk for any and all purposes connected with the operation of its freight traffic, and if so, was such grant within the power of the Board of Commissioners to make?" (Printed record, page 21.)

We respectfully submit that the questions arising in this case are much more extended than this statement by the learned District Judge. The plaintiff contends:

1. That the authorities of the city of Raleigh, at the time of the grant of permission to the Raleigh & Gaston Railroad Company to occupy the sidewalk on the east side of Salisbury Street, had power to grant such right.

2. That if the power did not exist in the city of Raleigh to grant the right to occupy the sidewalk, such right was granted by statute enacted by the General Assembly of North Carolina.

3. That if this statute granted such right only when the municipality gave its assent to the railroad company, such assent was expressly given by the city of Raleigh

to the Raleigh & Gaston Railroad Company by the ordinance of 1881.

4. That it is not essential that such assent be in the form of a grant.

5. That if such assent was not expressly given by the ordinance of 1881, the city is estopped by the lapse of time and by its acquiescence to deny that it has given its assent.

6. That after the lapse of so many years the assent of the city of Raleigh will be presumed.

7. That the grant by the city of Raleigh of the right to occupy the sidewalk, when acted upon by the railroad company by the construction of its track, created a contract right in perpetuity the obligation of which cannot be impaired by the ordinance of June 10, 1913, requiring the defendant to remove the track.

8. That the statute enacted by the General Assembly, authorizing a railroad company to construct its tracks in a public street, when accepted by the construction of the tracks of the Raleigh & Gaston Railroad on the sidewalk of Salisbury Street, created a contractual right in perpetuity the obligation of which cannot be impaired by the ordinance of June 10, 1913, requiring the defendant to remove the track.

Incidental questions which arise under these main heads are set out in the course of the argument herein.

ARGUMENT

Jurisdiction of United States Courts.

This case is before the court on direct appeal from the judgment of the District Court under section 238, Judicial Code.

Referring to the jurisdiction of the United States District Court, District Judge Connor says:

> "While it is settled by abundant authority, that Courts of Equity will not, save in exceptional cases, enjoin the

enforcement, or execution of the criminal law, or of city ordinancees imposing fines and penalties for their violation, it is also settled that where rights of property are involved, and the enforcement of such ordinances violates vested rights, injunctive relief will be awarded, especially where such enforcements will work irreparable injury. In *Owensboro v. Cumberland Telephone Co.*, 230 U. S. 58, the court enjoined the enforcement of an ordinance revoking a grant of a franchise to occupy the streets of a city. The power of the court to enjoin the enforcement of an ordinance regarding railroad tracks in the streets was recognized in *A. C. L. R. R. Co. v. Goldsboro,* 232 U. S., 548."

The District Court has jurisdiction in a case of this character regardless of citzenship of the parties.

Mercantile Trust & D. Co. v. Columbus, 203 U. S. 311.

"All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have a contract with the city, which the latter had attempted to impair."

City Ry. Co. v. St. R. Co., 166 U. S., 557.

The United States Supreme Court Will Determine for Itself Whether a Contract Exists and Whether Its Obligation Has Been Impaired.

It seems to be well settled by the decisions of this court that in considering the effect of the action of the governing body of a municipal corporation insofar as it is contended that such action creates a valid and binding contract, and whether the obligation of such contract, if it exists, is impaired by the subsequent action of the governing body of such municipal corporation, this court will determine such questions for itself.

New York Electric Line Co. v. Empire City Subway Co., 235 U. S., 179.

Russell v. Sebastian, 233 U. S., 195.

"Whether the repeal of so much of a municipal ordinance granting trackage rights in a city street to a railway company as relates to double tracks was presumptively a reasonable exercise of the police power or a legislative impairment of the contract ordinance is a question which the Federal Supreme Court, on writ of error to a State Court, must decide for itself independently of the decisions of the State Court."

Grand Trunk Western Ry. Co.v. South Bend, 227, U. S., 544.

The Authorities of the City of Raleigh, at the Time of the Grant of Permission to the Raleigh & Gaston Railroad Company to Occupy the Sidewalk on the East Side of Salisbury Street, Had Power to Grant Such Right.

The plaintiff contends that the city had this authority under its general powers and by the terms of its charter in force at the time the permission to construct the track was granted.

The question of the right granted by the general statute authorizing railroads to occupy streets with the consent of the municipality is discussed under another head at page 21 of this brief.

"A city has authority, under its general powers, to grant to private parties for public purposes reasonable rights and privileges in its water system, its streets, its public grounds and its other public utilities, provided that such grant and its exercise does not materially impair the usefulness of these utilities for the public purposes for which they were acquired or dedicated."

Power Co. v. Colorado Springs, 105 Fed. 1.

"Municipal corporations, under their general powers, have authority to grant railroad companies the right to lay their tracks longitudinally upon a street provided

that the use does not destroy or unreasonably impair the street as a highway for the general public."

New Castle v. R. R. 155 Ind. 18.
C. B. & Q. R. R. v. Quincy, 136 Ill., 489.

The charter of the city of Raleigh was revised and consolidated in chapter 98 of the Private Acts of 1856-57, section 58 of which is as follows:

"That the Commissioners shall cause to be kept clean and in good repair streets, sidewalks and alleys. They may establish the width and ascertain the location of those already provided and lay out and open others and may reduce the width of all of them."

The plaintiff contends that the power granted by this section is sufficient to include the power to permit the Raleigh & Gaston Railroad Company to occupy the sidewalk on the east side of Salisbury Street for the purpose of running a track. We submit that this section carries with it the power to *regulate* the streets of the city of Raleigh, and the power to regulate has been held to embrace the power to grant to a public service corporation the right to use the streets.

Owensboro v. Cumberland Telephone & Telegraph Co. 230 U. S., 58.

The question of the power of a municipality to grant to a quasi public corporation the right to occupy the public streets under the provisions of a charter issued by the State Legislature giving the municipality the power to regulate its streets seems not to have been definitely decided by the Supreme Court of North Carolina. Upon this point District Judge Connor says:

"Conceding that the power granted the Commissioners, in regard to the use of the streets, includes the power to 'regulate' such use, and giving to this language the

interpretation given it in *Cumberland Telephone Company Case, supra,* and in *Moore v. Power Company, supra,* the question is yet open, whether the power claimed by plaintiff is conferred. In *State v. Railroad,* 141 N. C., 736, the Supreme Court of this State held: 'In the absence of an express power in the charter of a city to grant a permanent easement in a street, a license granted to a railroad company to lay tracks and operate trains in a street cannot be construed as a grant of a permanent easement.' After citing authorities, it is said: 'The general rule to be extracted from the authorities is that the legislative power vested in municipal bodies, is something which can not be bartered away in such manner as to disable them from the performance of their public functions.' While the Supreme Court of this State has, in a number of cases, sustained the power of the Commissioners, or other governing body of municipalities, to grant to public service corporations the right to place their tracks, poles, wires, pipes, etc., in, under and along the public streets, no case has been found in which the power has been claimed to grant an exclusive and perpetual use of a street, or sidewalk, to such corporations."

In *Butler v. Tobacco Co.,* 152 N. C., 416, the Supreme Court of North Carolina considered the power of a municipal corporation to grant a railroad company the right to occupy the public street for the construction of a private siding to the plant of the tobacco company. It was held that in the absence of legislation the municipal authorities could not grant any use of the streets for a private purpose.

It is true that in *State v. Railway,* 153 N. C., at page 562, Chief Justice Clark says that the Court has already held in *Butler v. Tobacco Co.,* 152 N. C., 416, that "without express legislative authority the streets of a city cannot be taken for railroad purposes, even with the consent of the town

authorities." An examination of that case will show that it did not go to the extent of holding that under the terms of a charter giving a municipality power to regulate its streets, the right could not be conferred on a railroad company to occupy the streets for a public purpose. The authority conferred upon the board of aldermen of the municipality does not appear in the opinion in that case, and it is to be assumed that the charter did not confer such authority on the municipal authorities, either expressly or by necessary implication.

In referring to *Griffin v. Railroad,* 150 N. C., 312, Chief Justice Clark says that there was express legislative authority for the occupation of the street by the railroad and that the board of aldermen also granted their permission under authority conferred upon them in the city charter. The opinion in that case shows that the authority of the railroad company to occupy the street was based upon the general statute authorizing a railroad to occupy the streets of a town, as shown by the following quotation:

> "The Revisal, Section 2567 (5) expressly grants to railroad companies the right to use the streets of a town or city with 'the assent of the corporation of such city.' The assent of the city to the use of Beech Street by the defendant railroad companies for this purpose has been duly given by resolution of its board of aldermen."

In this case the Court says:

> "The city clearly possessed the statutory right to assent to the use of the street by the railroad company. This is a most essential power necessary to be used for the benefit of the people of the city."

The language of the Court in the Griffin Case also indicates that the authorities of the town of Goldsboro had the power under the charter to grant the right to the use of the street. Chief Justice Clark says:

> "The chief street in Goldsboro, running through its center and for the whole length of the town, has been used for over seventy years by one railroad, for sixty years by two, and for half a century by all three of these railroads. It is singular that it should now be contended that 420 feet of this remote street, almost on the edge of the town, cannot thus be used, with the assent of the town, whose charter confers on it the right to change and even abolish any street."

We submit that in none of the cases decided by the Supreme Court of North Carolina has it been held that the language of a charter similar to the charter of the city of Raleigh, in force in 1881, does not confer the power upon a municipal corporation to grant to a railroad company the right to place its tracks in a public street, and that the statement of general principles in some of the cases will not be strongly persuasive when this court comes to consider that question. It has been held that in determining the meaning of the statute alleged to create the contract much weight will be given the decisions of the State court construing such statute, but they will not be binding upon this court. Thus, it has been said:

> "It is true that this Court has repeatedly held that the discharge of the duty imposed upon it by the Constitution to make effectual the provision that no State shall pass any law impairing the obligation of a contract requires this Court to determine for itself whether there is a contract, and the extent of its binding obligation; and parties are not concluded in these respects by the determination and decisions of the courts of the States. While this is so, it has been frequently held that where a statute of a State is alleged to create or authorize a contract inviolable by subsequent legislation of the State, in determining its meaning much consideration is given to the decisions of the highest court of the State. Among

other cases which have asserted this principle are *Freeport Water Co. v. Freeport,* 180 U. S., 587; 45 L. Ed., 679; 21 Sup. Ct. Rep., 493, and *Vicksburg v. Vicksburg Waterworks Co.,* 206 U. S., 496, 509; 51 L. Ed., 1155, 1160; 27 Sup. Ct. Rep., 762."

Milwaukee Elec. R. & L. Co. v. Railroad Com., 35 Sup. Ct. Rep., 820.

In the case cited the State Court had construed the very statute under consideration, but there is no decision of the Supreme Court of North Carolina construing the language of the charter of the City of Raleigh.

The nearest approach to it is the construction by the Court of the Goldsboro charter, which Chief Justice Clark says in *Griffin v. Southern Ry. Co., supra,* confers on the municipality "the right to change and even abolish any street." It is strongly intimated, as we have said, that such right included the right to grant to a railroad company authority to construct its tracks in the streets of the municipality.

The charter of the City of Raleigh in force at the time of the construction of this track on Salisbury Street, provided that the Commissioners could "reduce the width" of all the streets within the limits of the corporation. (Printed Record, page 17.)

Under the charter now in force, and which was in force when the ordinance of 1913, ordering the removal of this track, was adopted, the commissioners of the City of Raleigh have power:

> "To direct, control and prohibit the laying of railroad tracks, turnouts and switches in the streets, avenues and alleys of the city, unless the same shall have been authorized by ordinance, etc." (Printed Record, page 17.)

This is a legislative inhibition upon the power of the Commissioners of the City of Raleigh to order the removal

of tracks from the public streets when such tracks "shall have been authorized by ordinance." It is also a legislative recognition of the right of the railroads to occupy the streets of Raleigh when authorized by ordinance to do so.

The Right To Construct This Track in the Street is Granted by Statute.

The right to occupy the streets may be given by the Legislature without the consent of the municipality.

Elliott on Roads and Streets, Section 1045.

The power given a railroad company by the Legislature to occupy the streets of a town with its track is altogether independent of the municipality.

Millvale v. Railroad, 7 L. R. A., 369.
Grand Trunk Wesern R. Co. v. South Bend, 227 U. S., 544.

The general statutory authority of a railroad to construct its track in a street in this State was first embodied in Chapter 138, Sec. 29(5), of the Acts of 1871-72, which was applicable, however, only to companies chartered under the provisions of that act.

Section 29(5) of Chapter 138 of the Acts of 1871-72 was brought forward in The Code of 1883, Section 1957, Sub-section 5, and the powers granted were extended to *all existing railroads* by Section 1982 of The Code of 1883.

The provisions of the statutes, (The Code, Sections 1957(5) and 1982) upon which the plaintiff relies were brought forward in Revisal of North Carolina of 1905, Section 2567, Sub-section 5, as follows:

> "All existing railroads shall have power: To construct its road across, along, or upon any stream of water, watercourse, street, highway, plankroad, turnpike, railroad or canal which the route of its road shall intersect or touch, but the company shall restore the

stream or watercourse, street, highway, plankroad and turnpike road thus intersected or touched, to its former state or to such state as not unnecessarily to have impaired its usefulness. Nothing in this chapter contained shall be constructed to authorize the erection of any bridge or any other obstruction across, in, or over any stream or lake navigated by steam or sail boats, at the place where any bridge or other obstruction may be proposed to be placed, nor to authorize the construction of any railroad not already located in, upon or across any street in any city without the assent of the corporation of such city."

The Raleigh & Gaston Railroad Company was chartered prior to 1871, (See Rev. Statutes of N. C. Vol. 2, page 299 for charter), and hence was not incorporated under the provisions of the Act of 1871-72, Chapter 138. The assent of the City of Raleigh to the construction of a spur track in Salisbury Street was given in 1881, as is shown by the following entry in the minutes of the meeting of the board of aldermen of August 6, 1881:

> "Upon application of John C. Winder, General Superintendent, the Raleigh & Gaston Railroad Company was granted permission to occupy the sidewalk on the east side of Salisbury Street, between Jones and Lane Streets, for the purpose of running a track."

In 1883, at the time The Code was adopted the powers granted by the Act of 1871-72 were extended to *all existing railroads,* thereby giving the Raleigh & Gaston Railroad Company power "to construct its road across, along or upon any street which the route of its road shall intersect or touch," provided "the company shall restore the street thus intersected or touched to its former state, or to such state as not unnecessarily to have impaired its usefulness." The extension of this authority so as to include the Raleigh & Gaston Rail-

road Company, gave that company ample authority for its occupation of Salisbury Street. At the time of the enactment of the Code, Sections 1957 and 1982, *the track was already located in Salisbury Street.* It would, therefore, seem that this track is not affected by the limitation, placed upon the exercise of the right to construct a track in a street by the statute, as follows: "Nothing in the chapter contained shall be construed to authorize the construction of any railroad *not already located in,* upon or across any street in any city without the assent of the municipality."

Authority to Occupy the Street Includes Authority to Occupy the Sidewalk.

The word "street" includes sidewalk, and in granting railroads the right to occupy a public street, with assent of the municipality, the language of the statute is broad enough to include sidewalks. We are not concerned with the rights of abutting owners, because in this case the plaintiff is the sole owner of the property adjacent to the sidewalk occupied by the track. In the absence of complaint by the abutting owner the State has the same control of the sidewalks of a municipal corporation as it has of any other part of the street. The Supreme Court of North Carolina so held in *Hester v. Traction Co.,* 138 N. C., 293, in which Chief Justice Clark says:

> "The sidewalk is simply a part of the street which the town authorities have set apart for the use of pedestrians. 27 Am. & Eng. Ency. (2d Ed.), 103; *Ottawa v. Spencer,* 40 Ill., 217; *Chicago v. O'Brien,* 53 Am. Rep., 640. . . . Sidewalks are of modern origin. Anciently they were unknown as they still are in eastern countries and in perhaps a majority of the towns and villages of Europe. In the absence of a statute a town is not required to construct a sidewalk. *Attorney General v. Boston,* 142 Mass., 200. It is for the town to prescribe the width of the sidewalk. In the absence of

statutory restriction it may widen, narrow or even remove a sidewalk already established. *Attorney General v. Boston, supra.* To widen a sidewalk narrows the roadway. To widen a roadway narrows the sidewalk. The proportion of the street to be preserved for pedestrians and vehicles respectively is in the sound discretion of the town authorities."

Alleghany County Light Co. v. Booth, 216 Pa., 564; 4 Words and Phrases (Second Series) page 711.

"The term street in ordinary legal signification includes all parts of the way, the roadway, the gutters and the sidewalks."

Elliott on Roads and Streets, (3rd Edition) Sec. 23.

In the present case it appears that there is forty-three feet of space in Salisbury Street at the point where this track is located devoted to the use of vehicles and a sidewalk thirteen feet in width to the west thereof devoted to the use of pedestrians. (Printed Record, page 16.)

We call attention to the fact that the ordinance of 1881 expressly assents to the use of the *sidewalk,* thereby manifesting the exercise of the discretion of the municipal authorities as to the part of Salisbury Street to be occupied by plaintiff's tracks.

"The designation of the street to be used is a matter to be determined by the governing body of the city, with an eye to the general welfare."

Griffin v. Southern Ry. Co., 150 N. C., 312.

The City of Raleigh Has Given Its Assent.

But should the statute, The Code, Section 1957(5), be construed to require the assent of the municipality before the authority to construct a track in a street could be obtained, the Raleigh & Gaston Railroad secured such as-

sent in 1881, and it was unrevoked and was in effect at the time of the adoption of the Code in 1883. This assent secured in 1881 was ratified by the continuous and uninterrupted occupation of the street until the year 1911, with the full knowledge and consent of the municipal authorities of the city of Raleigh. (Facts agreed, paragraph 4, record, page 16.)

In the case of the *City Railway v. Citizens' Street Railroad Company,* 166 U. S., 557, it appears that in December, 1889, the Common Council of the city of Indianapolis adopted an ordinance amendatory of the original ordinance granting the Citizens' Street Railroad Company the right to use the streets, adopted January 18, 1864, to the effect that "the cars to be used on such tracks shall be operated with animal or electrical power only." At the time this amendatory ordinance was adopted there was no law of the state permitting electricity to be used and it was claimed that the Common Council exceeded its powers in authorizing this change to be made. The Supreme Court held otherwise, Mr. Justice Brown saying:

> "But it seems that on March 3, 1891, a law was enacted by the General Assembly, declaring that any street or horse railroad heretofore or hereafter organized . . . may, with consent of the Common Council of the city . . . use electricity for motive power. Conceding, though not deciding, that the city might have exceeded its lawful power in authorizing the change from animal power to electricity, in the absence of legislative authority to do so, we think the act of 1891 should be construed, not only as conferring a new authority upon the city, but as a ratification of what the city had already done in that direction. In view of the large expenditures incurred by the company upon the faith of this ordinance, it is ill becoming the city to set up its own want of power to make it, when such power was directly and explicitly given a few months thereafter."

The legislature of North Carolina certainly had the power to authorize railroads to construct their tracks along public streets with the assent of the municipality, and when such assent is given and the authority acted upon by the construction of the track, a contractual right is created which cannot be impaired by subsequent legislation.

> New York E. L. Co. v. Empire City Subway Co., 235 U. S. 179.

In this case the legislature of the State of New York authorized certain companies to place their wires under the streets of the cities of New York and Brooklyn, provided that they first obtain from the common council of such cities *"permission to use the streets"* for such purposes. The common council of the city of New York adopted a resolution "that permission be and hereby is granted to New York Electric Lines Company to lay wire or other conductors of electricity in and through the streets, avenues, and highways of New York City," etc. In discussing the position that the municipal consent makes effectual the rights granted by the State, Mr. Justice Hughes quotes with approval the following language in the opinion in *Ghee v. Northern Union Gas Co.*, 158 N. Y. 510:

> "It is true that the franchise comes from the state, but the act of the local authorities, who represent the state by its permission and for the purpose, constitutes the act upon which the law operates to create a franchise."

> Grand Trunk Western Ry Co. v. South Bend, 227, U. S. 544.

The City of Raleigh is Estopped to Deny That It Has Given Its Assent.

We submit that the City of Raleigh, after the lapse of thirty-two years, is estopped to deny that its assent was given

to the occupation of Salisbury Street by the tracks of the Raleigh & Gaston Railroad. It has stood by and seen the merger and consolidation of the Raleigh & Gaston Railroad with the Seaboard Air Line Railway and other railroads under legislative authority, knowing that the track on Salisbury Street and the right to occupy the street was a valuable asset of the Raleigh & Gaston Railroad, and included as such in appraising the value of its property for the purposes of the merger, and that it was used by the Raleigh & Gaston Railroad and Seaboard Air Line Railway as a basis of credit. (For history of this consolidation, see *Spencer v. Seaboard Air Line Railway,* 137 N. C., 107.)

Judge Dillon in discussing the right of a railroad to occupy the streets says:

> "If the municipality has the power to grant such right or franchise and a corporation believing and assuming that it has the consent or grant of the municipality, has, with the knowledge of the proper municipal authorities, proceeded to exercise the right or franchise, and has constructed, maintained and operated its works and appliances in the city streets, the municipality will, in a proper case, be estopped by the acts and conduct of its officers and representatives in knowingly permitting and acquiescing in the use and occupation of the streets, from asserting the invalidity of the grant of the franchise, so far at least, as concerns its failure to pass an ordinance or take the steps necessary to effectuate the grant."
>
> Dillon on Municipal Corporations, (5th Ed.) Section 1242.

This statement of the law by Judge Dillon is fully supported by the decision of this Court in *City Ry. Co. v. Citizens' St. R. Co.,* 166 U. S., 557, in which it is held that:

> "A city which, without express legislative power to do so, has authorized a street railway company to change

from horse power to electricity, will be estopped from setting up a want of such power, after the company has incurred large expenditures in making the change, and after the Legislature by a subsequent general law has conferred power on city councils to authorize such changes."

The City of Raleigh, since 1883, has had the power by its assent to effectuate the right granted to the plaintiff by the Legislature, along with other railroads, to occupy the streets of a municipal corporation with the assent of such corporation, and certainly it should be estopped by the conduct of its officers and representatives in acquiescing in the occupation of Salisbury Street from asserting at this late day that since the Statute of 1883 was enacted it has not given its assent thereto.

See Note 11 A. & E. Anno. Cases, page 295.

After the Lapse of so Many Years, the Assent of the City of Raleigh Will Be Presumed.

Dillon on Municipal Corporations (5th Edition), page 1947, says:

"No particular mode of manifesting the municipal consent to the construction of a railroad or other public utility in the city streets is prescribed by the usual constitutional provision, and in such case it has been said that so far as the constitution is concerned, such consent may be either express or implied. And it has been held that the consent of the municipality required by statute *may be presumed* where the streets of the municipality have been used for a long period of years by the company under such circumstances as to amount to a claim of the right to use them." (Italics added.)

In *New Castle v. Railroad,* 155 Ind., 18, the Indiana Supreme Court holds:

"The occupation of the streets of a municipality by a railroad company with its tracks for a period of thirty

years under such circumstances as to amount to adverse possession raises the presumption of a grant."

See also Chicago v. Union Stock Yards, 164 Ill., 226.

In *New Castle v. Railroad, supra,* the Indiana Supreme Court says:

> "Prescription is the presumption of a grant. There can be no presumption of a grant, if the alleged grantor is lacking in a legal capacity and if the subject-matter of the grant is unlawful. No length of user would give a railroad company the absolute ownership of a street, for that is not the municipality's to grant. But property that a municipality has the power to convey may be acquired from it by prescription. In *Jorgenson v. Squires,* 144 N. Y., 280, and in *People v. Collis,* 45 N. Y. Supp., 282, it was held that the Legislature having authorized municipalities to grant property owners the right to build and maintain certain structures in the streets, the continued use of such a structure for more than twenty years, with the knowledge and acquiescence of the municipality, raised the conclusive presumption of grant." (Page 26.)

This position is supported by *Turner v. Commissioners,* 127 N. C., 153, which has been decided since the enactment of Section 389 of the Revisal, providing that title to a street cannot be acquired by adverse possession. It is held that where the municipal corporation has the power of alienation, title can be acquired by twenty years adverse possession.

> "As to streets, ways, squares, parks, commons, and other property which a municipal corporation may hold in trust for the public use, without power to alienate, it is true that no statute of limitations can run . . . Since no one would obtain any title there if he had a deed from the town, no adverse possession, however

long, would bar the town; and the same was the civil law. This has been affirmed in this State by statutory declaration (see Revisal, Section 389); but as to all other matters the Statute of Limitations runs against a municipality as against anyone else. Acts of 1831-32, above cited, took from the commons here in question its inalienability. Sale thereof was authorized. Much of it was sold. A conveyance from the town since that date for any part thereof would be valid, and it follows that twenty years adverse possession up to a known and visible boundary,—the row of cedar trees, the dotted line on the map—confers a good title."

Town officers are given power to sell the property of the town to a railroad by Code, Section 1955; Revisal of 1905, Section 2596.

In *Pipkin v. Wynns,* 13 N. C., 402, it appeared that Thomas Wynns had conducted a ferry across the Chowan river from the year 1790 to 1825, but it did not appear that the said Wynns had ever obtained an order of the County Court establishing such ferry, as was required by the statute. It also appears that after the death of Thomas Wynns, the defendants applied to the County Court, and were appointed ferry keepers. The plaintiff, one of the heirs of Thomas Wynns, contested the validity of the grant to the defendants, contending that the right to run the ferry belonged to the heirs of Thomas Wynns. While the disposition of the case did not require a decision of the question of presumption, Chief Justice Henderson says: *"We are of opinion, also, that in this case, the long user is sufficient to raise the presumption of a grant;* but this it is unnecessary to consider."

There can be no doubt that a grant from the County Court, as well as from the State directly, or from an individual, may be proved by a user for forty years, or even less.

Barrington v. Ferry Co., 69 N. C., 896.
See State v. Long, 94 N. C., 896.

If the City of Raleigh had the power, either under its charter or under the general law to grant the right to a railroad company to occupy the public streets with its track, as we contend it did have, then the lapse of time will raise a presumption of such grant, and certainly the lapse of time will raise a presumption of the *assent* of the City of Raleigh to such occupation.

But it is said that the ordinance of 1881 was a mere license revocable at the will of the authorities of the City of Raleigh and the occupancy of this sidewalk was not adverse until the plaintiff was ordered to remove it in 1913, and, therefore, there could be no presumption of a grant of the right. We submit that this view entirely disregards the contention of the defendant that the *assent* of the municipality will be presumed. We submit further that it is based upon a misapprehension of the force and effect of the ordinance of 1881.

The Ordinance of 1881 is not a Revocable License, but is a Grant of the Right to Occupy the Sidewalk.

The language of the ordinance is that the Raleigh & Gaston Railroad "was granted permission to occupy the sidewalk," etc. Under the authority thus granted, the Raleigh & Gaston Railroad proceeded at much expense to extend its track along the sidewalk for a distance of more than 420 feet. It was not a temporary track for a temporary purpose, but, as will appear in Paragraph 3 of the Facts Agreed (Printed Record, page 15), it has *"since its construction been used by the Raleigh & Gaston Railroad Company and its successor, Seaboard Air Line Railway, as a public track for the delivery and receipt of freight for intra and interstate transportation, and it has been and is now used by the merchants of the City of Raleigh and by the public, and the track on account of its location is convenient for this purpose."*

An ordinance becomes a contract, whether regarded as a

franchise, license or mere permission, and a city cannot impair or destroy the rights conferred.

Southern R. R. v. Portland, 177 Fed., 959.

In the case of *Owensboro v. Cumberland Telephone & Telegraph Company,* 230 U. S., 58, it appeared that an ordinance containing the following provision was passed by the Common Council of the Town of Owensboro, Ky.

> "That the Cumberland Telephone Company, its successors and assigns, is authorized and hereby granted the right to erect and maintain upon the public streets and alleys of said city any number of telephone poles of proper size, straight and shaved, smooth, set plumb and set erect, and any number of wires thereon, with the right to connect such wires with the building when telephone stations are established, provided that such poles shall be located and kept so as not to interfere with the travel upon said streets or alleys or the substantial use thereof by the inhabitants of said city."

The other provisions of this ordinance related to the manner of the construction of the poles and lines of the telephone company and provided that the right granted should not be construed as an exclusive right. There was no provision whatever limiting the period for which the rights granted by this ordinance should run.

In holding that the ordinance created more than a mere license, Mr. Justice Lurton says:

> "That the right conferred by the ordinance involved is something more than a mere license is plain. A license has been generally defined as a mere personal privilege to do acts upon the land of the licensor, of a temporary character, and revocable at the will of the latter unless, according to some authorities, in the meantime expenditures contemplated by the licensor when the license was given have been made. See *Greenwood*

Lake & P. J. R. Co. v. New York & G. L. R. Co., 134 N. Y., 435; *Southampton v. Jessup*, 162 N. Y., 122, 126.

"That the grant in the present case was not a mere license is evident from the fact that it was upon its face neither personal nor for a temporary purpose. The right conferred came from the State through delegated power to the city. The grantee was clothed with the franchise to be a corporation and to conduct a public business, which required the use of the streets, that it might have access to the people it was to serve. Its charges were subject to regulation by law, and it was subject to all of the police power of the city.

"That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases: *Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S., 368, 395; *Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S., 649, 661; *Boise Artesian Hot & Cold Water Co. v. Boise City*, opinion just handed down (230 U. S., 84). As a property right it was assignable, taxable, and alienable. Generally it is an asset of great value to such utility companies and a principal basis for credit.

"The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general

law of the State, or by the corporate powers of the city making the grant."

Grand Trunk Western Ry. Co. v. South Bend, 227 U. S., 544.

New York E. L. Co. v. Empire Subway Co., 235 U. S., 179, and cases cited in the margin.

In Grand Trunk Western Ry. Co. v. South Bend supra, Mr. Justice Lurton Says:

"The power to regulate implies the existence. and not the destruction, of the thing to be controlled. And while the city retained the power to regulate the streets and the use of the franchise, it could neither destroy the public use nor impair the private contract, which, as it contemplated *permanent,* and not *temporary, structures, granted a permanent, and not a revocable, franchise.* Both the street and the railroad were arteries of commerce. Both were highways of public utility, and both were laid out subject to the authority of the state, though the power to regulate the use of the street has been delegated to the municipality. So that, while the company was itself authorized to select the route between the terminal points named in the charter, it could not use streets without the consent of the city through which the line ran. In determining whether they would grant or refuse that consent the municipal authorities were obliged to balance the present and prospective inconvenience of having trains operated through its streets against the advantage of having the railroad accessible to its citizens. It could have refused its consent, except on terms; it could have forced the road to the outskirts of the town, or could have permitted the company to lay tracks in the more thickly settled parts of the city. When such consent was once given, the condition precedent had been performed, and the street franchise was

thereafter held, not from the city, but from the state; which, however, did not confer upon the municipality any authority to withdraw that consent, nor was there any attempt by the council to reserve such power in the ordinance itself."

Construction of the Statute Enacted by the North Carolina Legislature Authorizing Railroads to Construct Their Tracks in Streets.

In *Griffin v. Southern Ry. Co.*, 150 N. C., 312, the Supreme Court of North Carolina says:

> "The Revisal, section 2567 (5) expressly grants to railroad companies the right to use the streets of a town or city with the assent of the corporation of such city. The assent of the city to the use of Beech Street by the defendant railroad companies for this purpose has been given by resolution of its Board of Aldermen. The city clearly possessed the statutory right to assent to the use of the streets by the railroad company. This is often a most essential power, necessary to be used for the benefit of the people of the city."

In *V. & C. S. R. Co. v. S. A. L. Ry.*, 161 N. C., 531, a proceeding by one railroad to condemn a right of way across the track of another railroad for the purpose of constructing a spur track to several industrial plants, the court, in upholding this right of condemnation, says:

> "The general act, Revisal 2556 (5) and (6) confers on every railroad the power to construct its road along or upon any stream of water, street, highway turnpike, railroad, or canal which the route of its road shall intersect or touch."

The section of the Revisal referred to in this quotation, which is taken verbatim from Volume 161, page 531, of the North Carolina Reports is evidently intended for Sec-

tion 2567(5) and (6). This will be shown by reference to the two sections.

The statutes of West Virginia and Wisconsin, which are similar to the North Carolina statute, have been held to authorize the construction of the tracks of a railroad along a street.

> Arbenz v. Railroad, (W. Va.) 5 L. R. A., 371;
> Sinnott v. Railroad, 81 Wis., 95.

> "The right of the N. Y. Central & Hudson River R. R. Co., as now exercised to maintain tracks in Tenth, Eleventh and Twelfth Avenues and West Streets in the city of New York was originally derived from the state, through the legislature, and not from the city, by a franchise which was not limited in its duration. The legislature intended that the right should be enjoyed by the successors of the grantee, and, hence, the railroad company is entitled to an injunction restraining the city and its officers from removing or attempting to remove such tracks."
>
> N. Y. C. & H. R. R. v. New York, 202 N. Y. 212.

For a strong case directly in point on the question of the right of the plaintiff to maintain this track, see:

> Port of Mobile v. R. R., 84 Ala., 115.

Legislative authority, conditioned upon the consent of the municipality has been held by this court to create a contractual right to maintain tracks in a public street which is protected by the contract clause of the Federal Constitution.

> Grand Trunk Western Ry. v. South Bend, 227 U. S. 544.

> "The state, with its plenary control over the streets, had this governmental power to make the grant. There

was nothing contrary to public policy in any of its terms and being valid and innocuous, the police power could not be invoked to abrogate it as a whole or to impair it in part. *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 17. Tracks laid in a street, under legislative authority, become legalized, and, when used in the customary manner, can not be treated as unlawful, either in maintenance or operation. As said by this court: 'A railway over . . . the streets of the city of Washington may be authorized by Congress, and if, when used with reasonable care, it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars, with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded.' *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 331. The inconvenience consequent upon the running of a railroad through a city, under state authority, is not a nuisance in law, but is insuperably connected with the exercise of the franchise granted by the State. If the police power could lay hold of such inconveniences, and make them the basis of the right to repeal such an ordinance, the contract could be abrogated because of the very growth in population and business the railroad was intended to secure."

Grand Trunk Western Ry. Co. v. South Bend, *supra*.

In *Griffin v. Southern Ry. Co., supra* the Supreme Court of North Carolina upheld the right of the railroad to occupy a street for the purpose of maintaining a spur track to the union station in the town of Goldsboro.

The Track on Salisbury Street is a Public Use.

Since the operation of the compress was stopped in 1906, this track has been used exclusively for the public in receiving and delivering freight and in placing cars thereon. When

the compress was in operation, there was a period of several months in each year, when the work of compressing cotton ceased and at such times the track was devoted exclusively to other purposes. The facts agreed leave no doubt as to the public character of this track. But if it were used merely for the purpose of transporting cotton to and from the cotton compress, its use would nevertheless be public.

In a very recent case, in which this question is discussed, Mr. Justice Hughes says:

> "It is urged, further, that the statute is necessarily invalid because it establishes as the criterion of the Commission's action the exigency of a private business. This objection, however, fails to take account of the distinction between the requirements of industry and trade which may warrant the building of a branch track, and the nature of the use to which it is devoted when built. A spur may, at the outset, lead only to a single industry or establishment; it may be its cost may be defrayed by those in special need of its service at the time. But none the less, by virtue of the conditions under which it is provided, the spur may constitute at all times a part of the transportation facilities of the carrier which are operated under the obligations of public service, and are subject to the regulation of public authority. As was said by this court in *Hairston v Danville & W. R. Co.* 208 U. S. 598, 608: 'The uses for which the track was desired are none the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.' There is a clear distinction between spurs which are owned and operated by a common carrier as a part of its system and under its public obligation and merely private sidings. See *State, De Camp, Prosecutor v. Hibernia Underground R. Co.* 47 N. J. L. 43; *Chicago,*

B. & N. R. Co. v. Porter, 43 Minn. 527; *Ulmer v Lime Rock R. Co.* 98 Me. 579; *St. Louis, I. M. & S. R. Co. v. Petty,* 57 Ark. 359; *Dietrich v. Murdock,* 42 Me., 279; *Beaford Quarries R. Co. v. Chicago I. & L. R. Co.,* 175 Ind., 303."

Union Lime Co. v. Chicago & N. W. R. Co., 34 S. C. Rep., at page 525.

If the railroad obtained the consent of the city of Raleigh to place this track in the street, the right to maintain it cannot be affected by the opinion of the city or abutting property owners that its use is not important or necessary to the proper operation of the railroad. The railroad is the judge of the necessity and extent of its use:

Railroad v. Olive, 142 N. C., page 276.
Railroad v. Lumber Co., 114 N. C., 690.

This case can be distinguished from *Butler v. Tobacco Co.,* 152 N. C., 416.

There the track was laid in the street for the purpose of serving a single industrial plant and it was held to be for a private use.

In Elliott on Streets and Roads, it is said to be clear that a municipality under general power giving it control over streets cannot permit the use of streets where the railroad is for the private use of an individual, citing the Butler case.

The Supreme Court of North Carolina has recently upheld the principle that a spur track to an industrial plant is a public use.

State v. Railroad, 153 N. C., 563.

And it is generally held that if a track is open to the public upon equal terms it is a public use.

Ulmer v. Railroad, 66 L. R. A., 387.
Clarke v. Blackmar, 47 N. Y., 150.

The Usefulness of Salisbury Street is not Unnecessarily Impaired.

It is said that Salisbury Street has not been restored "to such state as not unnecessarily to have impaired its usefulness." This contention was made in the case of *Arbenz v. Railroad,* 5 L. R. A., 371, construing the West Virginia statute on this subject, and we submit that the opinion of the Supreme Court of West Virginia contains a complete answer to such contention .

In this case it is held that:

> "Under the provisions of our statute, Section 50, Chapter 54, of the Code of 1887, a railroad company, with the assent of the municipal authorities, may construct and operate its railroad along a public street of a city in a cut or excavation below the common level of the remaining portion of the street, in such manner as will appropriate a portion of the street to the exclusive use of the railroad company, provided such excavation does not occupy the entire street or such considerable portion thereof as would substantially prevent the use of the street by the general public, and provided, further, that it does not unnecessarily impair the usefulness of the street as a highway for the general public."

The language of the West Virginia act authorizing the use of streets by railroads will be found to be identical with the language of Section 2567(5) of the Revisal of North Carolina of 1905, which as it originally appeared in the Code, was enacted in 1883. In considering the extent to which a

street can be impaired by the construction of a railroad therein, Snyder, P. J., in the *Arbenz Case,* says:

"The grade of a railroad necessarily embraces considerations of convenience, expense and facility of construction and operation, and is fixed at a particular point with reference to grades at other points. It is therefore not only proper and reasonable, but almost indispensable, that railroad companies should be allowed a very large discretion in the location and fixing the grades of their roads. It seems to me to be a fair presumption that when the Legislature granted to railroad companies the right to occupy and use the streets of cities, towns and villages of this State, it intended that they should have the privilege of constructing their roads, to a large extent, in their own way, and of passing along and upon, or crossing the street, over, under or at grade, provided they should not unnecessarily impair the usefulness of the street. *People v. New York Central and H. R. R. Co.,* 74 N. Y., 302; *Adams v. Saratoga & W. R. Co.,* 11 Barb., 414, 450.

"This construction of our statute is greatly strengthened by the qualification herein which prohibits railroads from occupying any street without the assent of the municipal authorities. It is very safe to assume that the city authorities will be careful to protect their streets from any improper use by a railroad company; and that, in giving their assent to the use of a street, they will do so in such a manner as will, in the least possible degree, impair its usefulness. It is certainly possible that, under some circumstances, it may be more practicable and cause less inconvenience to the public, and do less injury to the abutting lot owners, to allow the railroad to occupy a portion of the street at a grade below or above the grade used by the general public than would be the case if the grade of the street was changed

by lowering or elevating it to the necessary grade of the railroad.

"Therefore, unless it clearly appears that the municipal authorities have abused their discretion by allowing such occupation of the street as will unnecessarily impair its usefulness, it seems to me it would be very unwise and improper for the courts to undertake to supervise their action. *Plant v. Long Island R. Co.*, 10 Barb., 26. . . . The use of the word 'unnecessarily' in the statute clearly implies that the usefulness of the street may be to some extent impaired. But this certainly does not mean that the street should be rendered useless. The streets of cities are public highways, and as such under the control of the State alone, and the State may grant the use of them against the will of the municipality. The city alone cannot grant to a railroad the privilege of using its streets, as the power is in the Legislature. The Legislature may discontinue the use of streets without restraint from private citizens claiming to be interested in the continuance of the street as adjoining owners or otherwise. The control of city streets may be properly delegated to the city authorities, with discretion to impose conditions on the use of the street, but the power is not in the city unless expressly delegated. Mills, Eminent Domain, Section 202; *Covington Street R. Co. v. Covington*, 9 Bush., 127.

"In the case before us, it appears that Twentieth Street is not materially obstructed, nor is its usefulness unnecessarily or unreasonably impaired. The facts show that the present width of the graded portion of the street in front of the plaintiff's property is only twenty-four feet, and that after the proposed excavation is made for the defendant's railroad the unobstructed portion of the street will still be twenty-two feet, thus showing that but two feet of the present open and graded part of the street will be occupied by the railroad. As before

stated, there is nothing in the record of this case to show that this is either an unnecessary or unreasonable appropriation or use of the street; and therefore we must hold that it is authorized by the statute, and the use and occupation of it by the railroad company in the manner aforesaid will not constitute a nuisance. *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala., 413; 2 Dillon Municipal Corporations, Sections 711, 564."

In his opinion in the instant case District Judge Connor says:

"To the suggestion that the occupation of the sidewalk on the eastern side of Salisbury Street does not unnecessarily impair the usefulness of the street, because there is a space of forty-three feet between curbs and thirteen feet sidewalk on the western sidewalk, it is sufficient to say that the control of the streets, in these respects, is committed to the Board of Commissioners of the city, and not to the courts. If the Board has the power to remove the track from the sidewalk, it is neither the province nor within the power of the Court to question its wisdom or propriety." (Printed Record, page 25.)

The plaintiff advances the contention that the usefulness of the street is not unnecessarily impaired in support of its position that the authority to occupy the street is granted by statute and for the purpose of coming within the requirement of the statute (The Code, Sec. 1957(5)) that the railroad company shall restore the street "to such state as not unnecessarily to have impaired its usefulness." This goes to the question of plaintiff's right in the street, and is, therefore, independent of any control of the commissioners of the street, except in the exercise of the police power, which would not include the power to destroy plaintiff's rights.

That the usefulness of the street is not unnecessarily impaired would seem to be demonstrated by its condition re-

maining unchanged for thirty-two years before the commissioners of the city manifested any interest in it, and by the further fact that the commissioners in authority in 1881 expressly referred to the *sidewalk* on the east side of Salisbury Street in granting permission to occupy the street. No street along which a railroad track is constructed can be restored to its former state, and the use of such street is *necessarily* impaired.

The Occupation of the Street Under Legislative Authority is a Contract Right in Perpetuity.

In the recent case of *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S., 58, Mr. Justice Lurton states the rule in this Court with respect to the duration of a grant of this character as follows:

> "The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the State, or by the corporate powers of the city making the grant. If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy. This conclusion finds support from a consideration of the public and permanent character of the business such companies conduct, and the large investment which is generally contemplated. If the grant be accepted and the contemplated expenditure made, the right cannot be destroyed by legislative enactment, or city ordinance based upon legislative power, without violating the prohibitions placed in the Constitution for the protection of property

rights. To quote from a most weighty writer upon municipal corporations, in approving of the decision in *People v. O'Brien,* 111 N. Y., 42—a decision accepted and approved by this Court in *Detroit v. Detroit Citizens' Street R. Co.,* 184 U. S., 368, 395: 'The grant to the railway company may or may not have been improvident on the part of the municipality, but having been made, and the rights of innocent investors and of third parties as creditors and otherwise having intervened, it would have been a denial of justice to have refused to give effect to the franchise according to its tenor and import, when fairly construed, particularly when the construction adopted by the Court was in accord with the general understanding. In the absence of language expressly limiting the estate or right of the company, we think the Court correctly held, under the legislation and facts, that the right created by the grant of the franchise was perpetual, and not for a limited term only.' Dillon Municipal Corporations (5th ed.), Section 1265."

In the case of *Boise Artesian H. & C. Water Co. v. Boise City,* 230 U. S., 84, the plaintiff in error claimed the right to maintain its water pipes in the streets of the city of Boise under the following ordinance:

"An ordinance granting Eastman Brothers the right to lay water pipes in Boise City.

The Mayor and Common Council of Boise City, Idaho, ordain:

Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their water-works, for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water pipes, in, through, and along and across the streets and alleys of Boise City, under the surface thereof, but they shall, at all times, restore and leave all streets and alleys, in, through, along, and across which they may lay such

pipes, in as good condition as they shall find the same, and shall, at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom.

Sec. 2. This ordinance shall take effect from and after its passage and approval.

Approved, October 3, 1889."

This ordinance was accepted, and the grantees named therein immediately began the construction of their plant. Later, in July, 1890, similar street rights were granted to a corporation of Idaho known as the Artesian Water & Land Improvement Company. This last-named company accepted the ordinance and expended much money in the construction of another water supply system. At some date prior to 1895, apparently on March 28, 1891, each of these grantees conveyed and assigned all of their rights, franchises, and easements to the plaintiff in error. Subsequently the plaintiff in error made large expenditures in improving the plants acquired from its predecessors, and maintained its pipes in the streets, and continuously furnished water to the city for its purpose and to private consumers. In June, 1906, the Common Council of Boise City enacted an ordinance requiring the water company to pay a monthly license of $300 for the use and occupancy of the streets in furnishing water to the residents of that city. The water company complained that the ordinance of 1906 was an impairment of the street rights acquired under the ordinance of 1889, and the length of the occupancy of the streets. In referring to the rights granted by the ordinance of 1889, Mr. Justice Lurton says:

> "The grant of the right to lay water pipes upon the streets for the purpose of distributing water, found in the ordinance of October 3, 1889, purports to be nothing more than a grant of the right to occupy the streets of the city with the distributing pipes of the water company. It was accepted, and about $200,000 has been expended in the construction of the necessary works and

the laying of its system of pipes under the streets. The assertion of the right to require the company, after so many years of occupation, to pay a monthly rental for the use of the streets, is grounded upon the claim that under the grant to the Eastmans it had obtained nothing more than a revocable license, and its occupation of the streets was therefore subject to be terminated at any time.

"The right which is acquired under an ordinance granting the right to a water company to law and maintain its pipes in the streets is a substantial property right. It has all of the attributes of property. It is assignable, and will pass under a mortgage sale of the property franchises of the company which owned it."

In *Old Colony Trust Co. v. Omaha,* 230 U. S., 100, the principal question was whether an ordinance containing the following language created a franchise or merely a revocable license:

"The New Omaha Thompson-Houston Electric Light Company, or assigns, is hereby granted the right of way for the erection and maintenance of poles and wires, with all appurtenances thereto, for the purpose of transacting a general light business through, upon, and over the streets, alleys and public grounds of the city of Omaha, Nebraska, under such reasonable regulations as may be provided by ordinance."

It was held that this ordinance created a right in perpetuity and that it was not revocable at the will of the city of Omaha.

"The grant of a right to use a street when accepted and acted upon is or becomes an irrevocable contract, and it cannot ordinarily be revoked by the municipality."

Elliott on Roads and Streets, Section 1053.

"The right to construct and operate tracks on a street

may be granted for a larger period than the charter duration of the corporation which takes the grant; and where there is no express limitation of time specified in the charter or ordinance giving the right, it is granted in perpetuity and exists forever."

4 Cook on Corporations 913.

In the case of *New York E. L. Co. v. Empire City Subway Co.*, 235 U. S., 179, it appears that:

"The plaintiff in error was incorporated in the year 1882, under a general law of the State of New York (Laws of 1848, chap. 265, as amended by Laws of 1853, chap. 471). Its certificate of incorporation stated, among other things, that it was incorporated for the purpose of 'owning, constructing, using, maintaining, and leasing lines of telegraph wires or other electric conductors for telegraphic and telephonic communication and for electric illumination, to be placed under the pavements of the streets . . . of the cities of New York and Brooklyn,' and 'for the purpose of owning franchises for laying and operating the said lines of electric conductors.' Chapter 483 of the Laws of 1881 had authorized any company so incorporated 'to construct and lay lines of electrical conductors underground in any city,' provided that it 'first obtain from the common council' of such city the 'permission to use the streets' for the purposes set forth. The permission in question, which, as already stated, was granted by the common council of the City of New York, on April 10, 1883, was (omitting parts not here material), as follows:

" 'Resolved, that *permission* be and hereby is granted to the New York Electric Lines Company, to lay wires or other conductors of electricity, in and through the streets, avenues, and highways of New York city, and to make connections of such wires or conductors under-

ground by means of the necessary vaults, test boxes, and distributing conduits, and thence above ground with points of electric illuminations or of telegraphic or telephone signals in accordance with the provisions of an ordinance . . . approved . . . December 14, 1878.'

"It was also resolved that the company should not 'transfer or dispose of the franchise hereby granted without the further authority of the common council.'" (Italics added.)

While the Court held that the right conferred by this resolution was lost by nonuser, it was decided that the language of the resolution granted contractual rights which, when accepted and acted upon, could not be impaired by any subsequent action on the part of the municipality. In the opinion of this Court, Mr. Justice Hughes says:

"The State Court, in its opinion in the present case, said that the question 'remaining to be determined' was whether 'the relator, under the resolution of the common council of April, 1883, has the right, as a matter of law, to have its wires inserted in the ducts of the Empire City Subway Company, notwithstanding the revocation of such resolution.' Did a 'bare acceptance' of the permission operate to vest an irrevocable franchise? 201 N. Y., p. 329. This question was answered in the negative in the view that such a permission is 'a license merely, revocable at the pleasure of the city, unless it has been accepted and some substantial part of the work performed,' as contemplated by the permission, 'sufficient to create a right of property and thus form a consideration for the contract.'

"The plaintiff in error challenges this view, insisting that, by virtue of the city's permission, it is the grantee of an irrevocable franchise in the city's streets; that this franchise was derived from the State; that when the

consent of the city was given, as provided in the statute, the grant became immediately operative and could not thereafter be revoked or impaired by municipal resolution or ordinance; that the granted right, however named, is property, and, as such, is inviolable; and that this position is supported by numerous decisions both of the State Court and this Court, which are cited in the margin. Thus, in *Ghee v. Northern Union Gas Co.*, 158 N. Y., 510, 513, referring to the legal effect of the consent of the municipal authorities under a statute empowering the corporation to lay gas conduits in streets, on such consent, the Court said: 'It operates to create a franchise by which is vested in the corporation receiving it a perpetual and indefeasible interest in the land constituting the streets of a municipality. It is true that the franchise comes from the State, but the act of the local authorities, who represent the State by its permission and for that purpose, constitutes the act upon which the law operates to create the franchise.' And in *Louisville v. Cumberland Telephone & Telegraph Co.*, 224 U. S., 649, 659, where a corporation was authorized to erect poles, etc., over the streets with the consent of the general council of the city, it was held that the charter franchises became 'fully operative' when the city's consent was obtained. 'Such a street franchise has been called by various names—an incorporeal hereditament, an interest in land, an easement, a right of way—but howsoever designated, it is property.' Id., p. 661. Again, in the recent case of *Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U. S., 58, 65, it was said: 'That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such a company is the granting of a property right has been too many times decided by this Court to need more than a reference to some of the later cases.' See also *Boise Artesian Hot & Cold Water Co. v. Boise City,*

230 U. S., 84, 91. These municipal consents are intended to afford the basis of enterprise with reciprocal advantages, and it would be virtually impossible to fulfil the manifest intent of the Legislature and to secure the benefits expected to flow from the privileges conferred, if, in the initial stages of the enterprise, when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way, the municipal consent should be subject to revocation at any time by the authorities—not upon the ground that the contract had not been performed, or that any condition thereof, express or implied, had been broken, but because as yet no contract whatever had been made, and there was nothing but a license, which might be withdrawn at pleasure. Grants like the one under consideration are not *nude pacts,* but rest upon obligations expressly or impliedly assumed to carry on the undertaking to which they relate. See the Binghamton Bridge Case (*Chenango Bridge Co. v. Binghamton Bridge Co.*), 3 Wall. 51, 74; *Pearsall v. Great Northern R. Co.,* 161 U. S., 646, 663, 667. They are made and received with the understanding that the recipient is protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated, as well as after that performance. The case of *Capital City Light & Fuel Co. v. Tallahasse,* 186 U. S., 401, to which the defendant in error refers, is not opposed. There the complainant, upon the ground of an exclusive privilege, sought to enjoin a municipality from operating its own electric light plant; although ten years had elapsed since the complainant's grant, the complainant had done nothing whatever to establish an electric light business, and under the express terms of the statute the exclusive privilege had not attached (Id., p. 410)."

This Right Is Protected by the Contract Clause of the Federal Constitution.

In *Grand Trunk Western Ry. Co. v. South Bend,* 227 U. S. 544, it is held that:

> "A municipal corporation could, in Indiana, confer by ordinance trackage rights in city streets upon a railway company whose charter provided that the railroad might be built through any city that would give its consent.
>
> "Rights acquired by a railway company under a valid municipal ordinance conferring trackage rights in the city streets, though subject to the power of the municipality to pass reasonable police regulations, are protected by the contract clause of the Federal Constitution from destruction by a subsequent repeal."

Whether the right to construct this track in Salisbury Street is granted by the municipal authorities of the city of Raleigh under general or specific power, or whether it is granted by statute and made effectual by the assent of the municipality, such right is protected by the Federal Constitution from impairment by the ordinance directing the removal of the track. Numerous authorities in this court, reference to which has been made, hold that a right so granted and accepted creates a contract within the meaning of the contract clause of the constitution.

Judge Dillon, in his standard work on Municipal Corporations Sec. 1242 says:

> "An ordinance of a city, made pursuant to legislative authority granting the right to use the streets of a city for a railroad, is when accepted and acted upon by the grantee, a contract within the protection of the Federal Constitution and new conditions cannot in the absence of a reserved power be imposed on the exercise of the right granted except so far as these conditions may be authorized by the exercise of the police power."

A resolution has the same effect as an ordinance:

> Street Railway Co. v. Des Moines, 151 Federal, 854.
> Southern R. R. v. Portland, 177 Fed. 959.

We submit in conclusion that the contractual right of the Seaboard Air Line Railway to maintain its track in Salisbury Street will be impaired and destroyed by the ordinance adopted by the commissioners of the city or Raleigh on June 10, 1913, as follows:

> "Upon the hearing of the matter of the removal of the spur track of railroad used by the Seaboard Air Line Railway and situated on the street and sidewalk on the east side of North Salisbury Street in the city of Raleigh, between Jones and Lane Streets, it is
>
> "Ordered that the chief of police of the city of Raleigh notify the said Seaboard Air Line Railway to remove said spur track, cross ties and rails and all other material constituting said track from said street and sidewalk within thirty days from the date of this order.
>
> "It is further ordered that if the said Seaboard Air Line Railway shall fail to remove said spur track within the said thirty days, that the Commissioner of Public Works of the city of Raleigh be, and he is hereby authorized, empowered and directed to forthwith remove said spur track, cross ties, rails and all other material from said street and sidewalk at the cost and expense of the said Seaboard Air Line Railway."

If we are correct in this position, it follows from the well settled decisions of this Court that this ordinance is invalid and its enforcement should have been enjoined by the District Court. We submit that the judgment of the District Court should be reversed.

We append a map of the location of this track for the information of the Court. This map was not in evidence at

the hearing in the District Court, and is not official, but is intended merely to assist the Court in more readily understanding the facts. The track in controversy is indicated by the red line extending along the street marked Salisbury, between Jones Street and Lane Street.

Respectfully submitted,

MURRAY ALLEN,

Counsel for Appellant.

Commercial Printing Co., Brief and Record Printers, Raleigh.

MAPS

TOO

LARGE

FOR

FILMING